IAC-PE-AW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35855/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th December 2015	**On 14th April 2016**
	.....

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR ABDUL WAJEED SALAM
(ANONYMITY NOT RETAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Rees, Counsel
For the Respondent: Miss Isherwood

DECISION AND REASONS

Introduction

1. The Appellant born on 2nd March 1989 is a citizen of India. The Appellant, who was present, was represented by Mr Rees of Counsel; the Respondent was represented by Miss Isherwood a Presenting Officer.

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Substantive Issues under Appeal

2. The Appellant had made application to remain in the United Kingdom as a Tier 4 (General Student) Migrant and that application was refused by the Respondent on 5th September 2014. The Appellant had appealed that decision and his appeal was heard by First-tier Immigration Judge Bart-Stewart. The judge had dismissed the appeal under the Immigration Rules but allowed it under Article 8 of the ECHR.

3. The Respondent had made application to appeal that decision, such application being made on 13th May 2015. The matter had come before me to decide firstly whether or not an error of law had been made and I heard that matter at Field House on 15th October 2015 and for reasons provided within the decision promulgated on 21st October 2015 found a material error of law had been made by the judge and issued directions in respect of progress of this matter to a re-hearing.

The Proceedings - Introduction

4. The Appellant was present. As a preliminary point Mr Rees submitted that the discrete issue under the Immigration Rules should be reopened because in his view a mistake of fact had been made in calendar calculation at the First-tier hearing. Such application was opposed by Miss Isherwood.

5. Mr Rees presented a bundle which turned out to be the same bundle presented at the First-tier Tribunal. There was no fresh evidence provided either by the Respondent or the Appellant.

6. The documents before me therefore consist of:

   - Respondent's bundle available at the First-tier;
   - **Nasim [2014] UKUT 25**;
   - **Patel [2013] UKSC 72**.

7. The Appellant's documents consist of:

   - skeleton argument dated 10th December 2015;
   - Appellant's bundle at the First-tier including those documents listed at folios 1 to 15 on the index sheet to that bundle.

Evidence

8. As noted above despite directions having been issued inviting the parties to present any fresh documents they sought to rely upon, no further evidence has come from the Appellant and that includes no witness statement. I heard submissions therefore firstly from Miss Isherwood. She submitted that I should dismiss the claim and opposed the suggestion by

Mr Rees that I should reopen the issue of the calendar dates which was the matter under the Immigration Rules. In terms of Article 8 of the ECHR she referred to the fact that there was a short two page witness statement from the Appellant that said really nothing about his situation in the UK in terms of family or private life. The information now provided was that his course rather than being completed in July 2015 was continuing well into 2016 although there was no evidence in respect of any progress if at all made on such studies and she noted that in his application form there had been a reference to the fact that he had not at that point started studies. I was referred to the case law of **Patel** and **Nasim**.

Submissions on Behalf of the Appellant

9. Mr Rees submitted in terms of what he said should be the start date in respect of the calendar and that the error that was made should be corrected. He then referred me to his skeleton argument and the various cases of **Patel** and **Nasim** and **CDS Brazil** in order to demonstrate that it would be proportionate to allow the Appellant's claim under Article 8 of the ECHR.

10. At the conclusion I reserved my decision to consider the documents and submissions raised. I now provide that decision with my reasons.

Decision and Reasons

11. In this case the burden of proof lies on the Appellant and the standard of proof required for both immigration and human rights issues is a balance of probabilities.

12. In this case I have found an error of law in the First-tier Tribunal Judge's decision that allowed the appeal under Article 8 of the ECHR for reasons set out in the decision promulgated on 21st October 2015. On the same day I issued directions allowing the parties to file all documents upon which they sought to rely upon at the resumed hearing.

13. At this resumed hearing, somewhat surprisingly, there were no new documents filed on the Appellant's behalf and while Mr Rees referred to an Appellant's bundle, that was essentially the same bundle that had been before the First-tier Tribunal at the original appeal hearing. The resumed hearing consisted of submissions from the parties. In this respect Mr Rees had provided a skeleton argument which for the most part sought to reopen the matter under the Immigration Rules as well as submitting briefly that the matter should be allowed alternatively under Article 8 of the ECHR.

14. At the First-tier Tribunal hearing the judge had dealt with the discrete point under the Immigration Rules, namely the correct calculation of calendar dates for the requisite minimum amount of money required in the Appellant's account. The judge had been fully aware of the Appellant's argument on this sole issue and directly quoted the relevant assertions

from the Appellant's witness statement at paragraph 5 of his decision. Furthermore the judge allowed time for both representatives to check this specific fact and recorded at paragraph 6 that Counsel on behalf of the Appellant conceded the calculation made by the Respondent was correct and in accordance with paragraph 1A(h) of Appendix C of the Immigration Rules. Counsel thereafter had relied upon Article 8 of the ECHR.

15. I find no fresh evidence or documentation to demonstrate that the agreed calculation of dates made at the First-tier Tribunal was wrong or disclosed any legal error when looking at the requirements of the Immigration Rules and the judge had been entitled to dismiss the appeal under the Immigration Rules.

16. The judge had clearly had sympathy with the Appellant's position in what appeared a "near miss" situation under the Immigration Rules, and I inferred (correctly or incorrectly) that in part it was that sympathy and the fact that the Appellant had claimed he was due to complete his course by July 2015 that led the judge wholly or partly to allow the appeal under Article 8 of the ECHR. I indeed expressed some sympathy for the Appellant's position in my error of law finding, given the "near miss" position and I also further expressed some surprise that this was still a live matter in autumn 2015 if indeed the Appellant was due to complete his course by July 2015.

17. The issue for this resumed hearing is essentially the Article 8 decision. As indicated above there is no new evidence on the Appellant's behalf. There is an absence of any evidence concerning the Appellant's progress or even start of the course of study to which this matter relates from the Appellant's college or any other body.

18. The Appellant does not have family life in the UK and it has never been suggested to the contrary. In terms of private life the evidence within the Appellant's bundle is almost silent upon this matter. His witness statement relates almost entirely to the Immigration Rule point referred to above. He provided no fresh witness statement to inform what he had been doing in the UK, his academic progress if any or any other related matters. There were no documents from any college or any other source. The scant information that came at the hearing through submissions seemed to suggest that any proposed course would in fact been continuing until 2016 rather than the earlier date of July 2015. However there was no evidence presented to show any progress on any course or at what stage if any the Appellant may be in any academic study. Indeed the application form of the Appellant in July 2014 did not indicate the Appellant had actually begun a course of study. Accordingly the only proper inference from what is available is that the Appellant whilst hoping to study a course, has not begun any such course nor can he point to evidence to show any start or progress upon any form of educational course. There is nothing further within the documents or referred to, that suggests any other aspects of private life.

19. In an examination of such private life therefore I begin with Section 117B of the 2002 Act. The Appellant's status in the UK is precarious given he has only had conditional and temporary leave to remain. I again refer to the case of **Patel [2013] UKSC 72**. The court noted that one could sympathise with Sedley in _ **Pankina** for commonsense in the application of the Rules to graduates who had been studying in the UK for some years. However the Supreme Court rejected Sedley's approach. Furthermore it is rather more clear now, that this Appellant does not appear to fall within that class of individuals that elicited sympathy from Sedley LJ. The case of **Patel** also made it clear that Article 8 is concerned with family and private life and not education as such. **Nasim [2014] UKUT 25** noted that **Patel** served to refocus the nature and purpose of Article 8 of the ECHR and to recognise that that Article limited utility in private life cases that are far removed from the protection of a person's moral and physical integrity. The Tribunal analysed both case law and academic writing on Article 8 of the ECHR within that case and concluded at paragraph 21 that the desire to undertake a period of poststudy work in the UK lies at the outer reaches of cases requiring an affirmative answer to the second question in **Razgar**, but even if the issue of proportionality was reached it was resolved decisively in favour of the Respondent.

20. The case before me, with the very limited evidence referred to above, suggests that it is itself at the outer reaches of those cases themselves described as being at the outer reaches of passing even the second stage test in **Razgar** as noted at paragraph 21 of **Nasim**.

21. I find that simply excluding the Appellant from beginning a course of study or continuing one for which no evidence of progress, attendance etc., has been provided does not mean that the Respondent's refusal under the Immigration Rules engages the second stage test of **Razgar**. Given the precarious nature of the Appellant's status and circumstances generally there are no exceptional circumstances warranting consideration under Article 8 (**SS Congo [2015]**). Accordingly on any construction of recent Superior Court decisions, Article 8 is not engaged in this case. However for the avoidance of doubt even if I move to the fifth stage test in **Razgar** and examine the proportionality of the decision, then that decision resolves itself decisively in favour of the Respondent.

Decision

22. I dismiss this appeal under the Immigration Rules.

    I dismiss this appeal under the Human Rights Act.

    No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Lever